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(2)

No. 09-528

DEC 4 - 2009

IN THE

Supreme Court of the United States

BRIDGEPORT PORT AUTHORITY,

Petitioner,

v.

BRIDGEPORT AND PORT JEFFERSON STEAMBOAT COMPANY, FRANK C. ZAHRADKA, and D & D WHOLESALE FLOWERS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a ferry passenger fee imposed by a governmental port authority excessive, and to that extent prohibited by the Commerce Clause – under the test established in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), and applied in *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 369 (1994) – where the fee funds essentially all of the authority's operating costs, but most of the authority's activities are unrelated to and confer no benefit on the passengers who pay the fee?

2. Is such a fee also prohibited by the Tonnage Clause – as interpreted in *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935), and *Polar Tankers, Inc. v. City of Valdez*, __ U.S. __, 129 S. Ct. 2277 (2009) – where the main purpose and effect of the fee is to raise revenue for general municipal purposes?

CORPORATE DISCLOSURE STATEMENT

All of the stock of respondent Bridgeport and Port Jefferson Steamboat Company is owned by its parent corporation, McAllister Towing and Transportation Company, Inc., which is a privately held company.

None of the stock of respondent D & D Wholesale Flowers, Inc. is owned by any privately or publicly held company.

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STATEMENT OF THE CASE[1]

Respondents, Bridgeport and Port Jefferson Steamboat Company (the "Ferry Company"), D & D Wholesale Flowers, Inc. and Frank C. Zahradka, submit this opposition to the petition for a writ of certiorari filed by Bridgeport Port Authority (the "Port Authority").

a. Introduction.

The statement of the case in the petition omits or mischaracterizes important parts of the record. The relevant facts are accurately summarized in the Second Circuit's decision (App. pp. 1a to 12a) and, in greater detail, in the District Court's decision (*id.*, pp. 23a to 54a). Therefore, instead of repeating the relevant facts, we provide herein a brief summary; in the remainder of this statement we address the most glaring omissions and mischaracterizations in the Port Authority's statement.

The essential facts were substantially undisputed at trial. Since its inception in 1993, the Port Authority has funded essentially all of its operating expenses from the passenger fee at issue in this case (App. pp. 7a to 8a, 30a to 33a). Yet the activities of the Port Authority, by design and in fact, have ranged far beyond the ferry

1. The following references are used herein: "**App.**" refers to the Appendix to the Petition in this case. "**E-**" (followed by page numbers) refers to the Exhibits to the Joint Appendix filed with the Second Circuit, which include the trial transcript as well as documents admitted as evidence at trial. References to the trial transcript include page and line numbers.

operation at the Bridgeport dock (*id.*, pp. 16a to 17a, 40a to 46a). The proceeds of the passenger fee have greatly exceeded the Port Authority's cost of the facilities and services it has actually provided to the ferry operation (*id.*, pp. 61a to 67a).

That excess, or overcharge, is illegal under the Commerce and Tonnage Clauses, as both lower courts have held. Under each clause, a government agency's user fee, such as the ferry passenger fee in this case, must not exceed the agency's reasonable cost of the services and facilities it provides to the fee payers (Points II and III below; *see also* App. pp. 14a to 19a, 55a to 69a).

The Port Authority has perverted the concept of a user fee; it has "taxed" a captive audience – the ferry passenger – excessively in order to fund a broad range of activities wholly unrelated to the ferry operation. The Commerce and Tonnage Clauses properly place limits on user fees to prevent such abuse. The Port Authority clearly has exceeded those limits in this case.

b. The facts were established at trial.

The Petition omits to state that the District Judge determined the facts after presiding over a five-day bench trial (App. p. 24a; E-1:1 through 1007:12, 2338-2445). The Court of Appeals did not disturb any of his essential factual findings (App. pp. 1a to 20a).

c. The ferry operation is confined to the "Dock."

The Petition fails to state that the Port Authority provides facilities and services to the ferry and its passengers *only* at a three-acre dock, which contains the ferryboat landing, a terminal building, an access road, and a staging area for vehicles waiting to board the ferry (the "Dock") (App. p. 59a; *see also id.*, pp. 26a to 29a). It was undisputed at trial that the Port Authority provides no facilities or services to the ferry or its passengers at any other location (E-65:13-16, E-420:24 to 421:2, E-241:20 to 243:15). As summarized in the next section, the Port Authority's activities range far beyond the Dock, both geographically and functionally.

d. The Port Authority's *non*-ferry activities extend far beyond the Dock and neither relate to nor benefit the ferry operation.

The Petition fails to describe fairly the extent to which the Port Authority's activities extend far beyond the Dock, both geographically and functionally, and neither relate to nor benefit the ferry operation. The Port Authority's geographic jurisdiction extends to all land (other than residential and park land) within 1,000 feet of Bridgeport Harbor, the two rivers that empty into it – the Yellow Mill and Pequonnock Rivers – and Black Rock Harbor, as well as certain other properties beyond those boundaries, including the 50-acre Steel Point peninsula, the 48-acre Bridgeport Regional Maritime Complex ("BRMC"), the Cilco Shipping Terminal, the Remington Woods, and the former General Electric factory (App. p. 26a).

Functionally, the Port Authority has devoted substantial financial resources, funded by the passenger fee, to projects and activities that, as the courts below found, are unrelated to and confer no benefit on the ferry passengers who pay the fee. These projects include:

(a) a project to establish a "high-speed ferry" service, whose boats would not carry vehicles and would ply different routes than that of the passenger and vehicle ferry at issue in this case;

(b) a project to start up a "barge feeder" service, which would ship containers by barge from the New York area and offload them in Bridgeport for transshipment by truck to other destinations;

(c) efforts to develop the 50-acre Steel Point peninsula;

(d) operation of a Free Trade Zone;

(e) supervision of three commercial shipping terminals;

(f) operation of a "pump-out" service for pleasure boats;

(g) acquisition of the land by condemnation and development of the 48-acre BRMC property, including improvements to and leasing of 23 acres to the privately-owned Derecktor Shipyard;

(h) review and determination whether to approve all proposed projects within its jurisdiction;[2]

(i) management of marinas;

(j) efforts to dredge the harbor, which would benefit the commercial shipping terminals but is not needed for the ferryboats; and

(k) condemnation of land for the benefit of a private aircraft manufacturer.

(App. pp. 40a to 46a.)

Even more egregiously, the Port Authority has spent funds collected from ferry passengers on a variety of perquisites and discretionary expenses, including season tickets to local minor league baseball and hockey teams; automobile lease, gasoline purchases and car washes for the executive director; charitable contributions; travel expenses for numerous trips unrelated to the ferry; personal long-distance telephone calls; club memberships; and Christmas gifts (*id.*, p. 46a; E-282:17 to 283:15; E-2005).

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2. These projects have included, among many others, a dog kennel, an asphalt plant, a paper recycling plant, and a commercial laundry facility (App. p. 45a).

e. Essentially all the Port Authority's operating revenue is derived from the ferry operation.

The Petition misleadingly states that its "budget is financed through several revenue streams," mentioning, among others, lease revenue from Derecktor Shipyard and dockage fees (Petition p. 4). In fact, such dockage fees are "minimal" (App. p. 30a n. 7) – only $3,750 since the Port Authority was established in 1993 (Tr. 485:8 to 486:1), compared to $9.5 million in passenger fees over the same period (App. 30a, 32a to 33a) – and any revenue from Derecktor is passed through to the City of Bridgeport (App. p. 30a n.7). Thus, "essentially all" of the Port Authority's operating expenses are funded by the ferry operation – the passenger fee and the lease payments made by the Ferry Company and its food services affiliate (App. pp. 8a, 30a to 33a).

f. The "Net Revenue Reports" verify that more than half the Port Authority's expenses do not relate to the Dock or to ferry passengers.

In a glaring omission, the Petition does not even mention these reports, which were a critical piece of the evidence at trial, and which the District Judge discussed at length in his decision (App. pp. 34a to 37a). The Port Authority and its outside auditors certify each year the net revenue that the Port Authority realizes from the Dock. The calculation is necessary because the Port Authority is contractually required to pay to the City of Bridgeport 15 percent of the Port Authority's annual net revenue from the Dock. The only revenue that the Port Authority takes into account in these reports is the passenger fee. To arrive at the "net revenue," of which 15 percent is payable to the City, the Port

Authority and its auditors determine what percentage of each expense category is allocable to the Dock. With few exceptions, the Port Authority and its auditors consistently have allocated 50 percent of each expense category to *non*-Dock activities. As the District Court found, even these allocations over-estimate the percentage of the expenses that the Port Authority has actually devoted to the Dock and ferry operation (*id.*, pp. 36a to 37a).

The net revenue reports thus constitute powerful evidence, from the Port Authority's own records and certified by its outside auditors, that more than half its expenses do not relate to the Dock or the ferry passengers, even though the passenger fee funds essentially *all* of the Port Authority's expenses. As the District Judge found, the net revenue reports are "tantamount to an admission on the part of the Port Authority that its expenditures were largely not related to the ferry operation or the Dock" (*id.*, p. 36a).

REASONS FOR DENYING THE PETITION

I. The Case Is Unworthy of Review Generally

The Petition cites a single consideration allegedly warranting review by this Court: that the Second Circuit's decision in this case conflicts with relevant decisions of this Court. *See* Supreme Court Rule 10(c). The Petition does not allege that the Court of Appeals' decision conflicts with that of another court of appeals, or of a state court of last resort, or that any other of the usual considerations governing review on certiorari apply in this case. *See* Supreme Court Rule 10(a) and (b).

As shown below, however, the Second Circuit carefully applied, and in no way departed from, this Court's relevant decisions analyzing user fees under the Commerce and Tonnage Clauses. The Port Authority's true objection is with the way in which the Second Circuit, as well as the District Court, applied the facts of this case to this Court's established precedents.[3] Even if the lower courts had misapplied the facts to a properly stated rule of law – which they did not do – that would not be a proper basis for this Court to grant a writ of certiorari. *See* Supreme Court Rule 10, last sentence; *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); E. Gressman, K. Geller, S. Shapiro, T. Bishop & E. Hartnett, *Supreme Court Practice* § 4.14, at 271-72 (9th ed. 2007) (hereinafter cited as "Gressman") (citing other cases to the same effect).

The courts below held that the fee in this case was excessive under *both* the Commerce Clause *and* the Tonnage Clause, although a violation of *either* would have been sufficient to support the judgment below. Thus, even if the Second Circuit's decision were in error as to one, but not both, of these grounds, the outcome in this case would not change. Accordingly, there would be no reason for the Court to grant the petition. *See* Gressman, § 4.4(f) (the Court may deny certiorari despite a clear conflict between circuits, if resolution of the conflict would not change the outcome of the case, citing

3. There was unanimity among the judges who considered the issues below. The two-member panel of the Second Circuit agreed with the District Judge, and none of the Circuit Court's judges dissented from the denial of the Port Authority's petition for rehearing en banc.

the denial of certiorari in *Sommerville v. United States*, 376 U.S. 909 (1964)).

II. The Commerce Clause

The parties, the District Court, and the Second Circuit all agreed that the test established in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), should be used to determine the legality of a user fee under the Commerce Clause (App. pp. 8a, 14a). This Court applied the *Evansville* standard, re-phrasing it as a three-part test, in *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 369 (1994). The Second Circuit, like the District Court, correctly stated the test (App. pp. 9a, 14a, 55a to 56a), and both courts then applied the test to the established facts of this case (App. pp. 14a to 18a, 56a to 67a).

The Petition claims, but does not demonstrate, that the Second Circuit's decision conflicts with *Evansville*. Its argument fails to take into account the important factual differences between *Evansville* and this case.

Evansville involved a geographically and functionally discrete facility – an airport. This case, in contrast, involves a geographically far-flung port district comprising more than 100 acres, spread over two harbors and including land adjacent to the harbors and their two tributary rivers, in which the Port Authority performs a broad variety of activities. Many of these activities concern the economic development of the entire region and have no connection whatsoever to the passenger ferry operation, which is confined to the

three-acre Dock (App. pp. 15a to 17a). The Second Circuit quoted testimony by the Port Authority's own expert witness and officials that the Port Authority's function is to foster economic growth in "the entire community," and even throughout the State of Connecticut (App. p. 19a).

The Second Circuit properly distinguished *Evansville* on these facts (*id.*). It pointed out that the airport facilities in *Evansville* were built "primarily to meet [the] special needs" of the commercial airlines that paid the fee (App. p. 15a) (quoting *Evansville*, 405 U.S. at 718-19), whereas the Port Authority in this case pursues "a variety of tasks, only some of which afford actual or potential benefits to the ferry passengers" (App. p. 15a). The District Court factually distinguished *Evansville* for similar reasons (App. pp. 60a, 63a to 64a).

In its Petition, the Port Authority quotes from *Evansville* – that "fifty per cent [of passenger fee revenue was] allocated to the municipalities or airport authorities owning the landing areas at which the fees were imposed in the form of unrestricted general revenues" (Petition p. 11, quoting *Evansville*, 405 U.S. at 720) – ostensibly for the proposition that an authority may impose a user fee to support general municipal purposes. That proposition is incorrect. As the Court in *Evansville* stated, regardless of how the fee revenue was allocated, the passenger fee revenue never exceeded the local authorities' actual *airport* costs. 405 U.S. at 720. In this case, by contrast, the Port Authority spends most of the passenger fee revenue on regional development projects, away from the Dock, which are unrelated to the ferry operation. The Port

Authority thus improperly equates the airport in *Evansville* to the entire port district in Bridgeport. As both the District Court and the Court of Appeals held, however, the airport in *Evansville* is properly analogized to the Dock, not the entire port district, because the Port Authority's non-Dock activities are neither physically nor *functionally* related to the ferry operation (App. pp. 16a and 63a).

In its Petition, the Port Authority repeatedly and incorrectly implies that, contrary to the teaching of *Evansville*, the lower courts required a "dollar-for-dollar" correspondence between the fees it collects from passengers and the amounts it spends for their benefit (Petition pp. i [Question 1], 8, 10). In fact, the District Judge expressly acknowledged that *Evansville* does not require "a 1:1 relationship" between the actual use of services and the cost of providing such services (App. pp. 58a to 59a) (quoting *New York State Dept. of Environmental Conservation* [*Jorling*] *v. U.S. Dept. of Energy*, 850 F. Supp. 132, 142-43 (N.D.N.Y. 1994), *aff'd sub nom. Jorling v. United States Dept. of Energy*, 218 F.3d 96 (2d Cir. 2000)). His decision that the fee in this case fails the "fair approximation" prong of the *Evansville* test was not based on a failure to adhere to a "dollar-for-dollar" relationship, but rather on the absence of any "rational relationship between the method used to calculate the Passenger Fee and the benefits available to the Passenger Fee-payers" (App. p. 59a).

The Second Circuit also expressly disavowed a "dollar-for-dollar" correspondence between the fee collected and the cost of the benefits conferred. It noted that this Court "has never held that the amount of a

user fee must be precisely calibrated to the use that a party makes of Government services" (App. pp. 14a to 15a) (quoting *United States v. Sperry*, 493 U.S. 52, 60 (1989)). But, the Second Circuit continued, "the discrepancy here exceeds permissible bounds" (App. p. 15a). As the District Court put it, "the difference between the amount of the fee and the benefits received by the ferry passengers is *vast*" (App. p. 69a, emphasis added).

The Petition also falsely states that the lower courts "ignored" $14 million in government grants that the Port Authority used to improve Dock facilities (Petition p. 9). In fact, both lower courts discussed these government grants (App. pp. 4a to 5a, 34a). The District Court expressly, and correctly, rejected the Port Authority's argument that it may charge passengers for the capital costs of projects that were funded, not by the Port Authority itself (from the passenger fee), but by federal and state government grants. The District Judge properly reasoned that the Port Authority may recoup from the passenger fee its own ferry-related *operating* costs of pursuing these capital projects – "personnel time, overhead, advertising, and other tangential costs" – but not the *capital* costs, which were funded by other government entities (App. p. 34a). *See Clallam County v. Dept. of Transportation*, 849 F.2d 424, 430 (9th Cir. 1988) (state agency that receives federal funds under Federal Highway Act, 23 U.S.C. § 101 *et seq.*, may charge tolls to recover its own, but not the federal government's, funding contributions). The Port Authority has not cited, in its Petition or below, a single decision by any court holding that an agency may justify imposing user fees based on costs that it does not incur

itself, but rather that other government entities incur in the form of grants to the agency.

The Port Authority's statement that the Passenger Fee is "a relatively small portion of the total ferry ticket price" (Petition p. 3) is true, but meaningless. Under *Evansville*, the fee must not be excessive in relation to the benefits the agency confers on the fee payer, not in relation to other costs incurred by the fee payer. For example, the passengers' cost of airfare was irrelevant, and was not even mentioned, in *Evansville*.

Finally, the Port Authority claims that the District Court erred (and that the Second Circuit should have so held) because, instead of giving the Port Authority essentially unbound "deference," the court "scrutinized every expenditure [of the Port Authority] as if it were conducting an audit" (Petition p. 8). The Port Authority even criticizes the District Judge for "examining in detail the Port Authority's activities (including such minutiae as . . . phone calls by administrative staff)" (*id.*, p. 6).

This criticism is grossly misplaced. The District Court properly examined the Port Authority's cost structure to determine the relationship, if any, between the passenger fee revenue and the cost of the facilities and services that the Port Authority provides to passengers. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-22 n.12 (1981) (under the Commerce Clause, "we have required a showing, *based on factual evidence in the record*, that the fees charged do not appear to be manifestly disproportionate to the services rendered") (emphasis added, internal quotations omitted); *see also Evansville*, 405 U.S. at 719-20 (citing

record evidence of fee revenue and bond retirement costs); *Northwest*, 510 U.S. at 359-60 (comparing airport's surplus from concession leases with shortfall from general aviation). How else, but by examining an agency's cost structure, could a district court determine – as it must under the first and second prongs of the *Evansville* test – whether a user fee (1) is based on a "fair approximation" of the fee payer's use of the facilities, or (2) is "excessive in relation to the benefits conferred"?

In sum, in holding that the passenger fee is excessive under the Commerce Clause, both lower courts followed the *Evansville* test and properly applied it to the established facts of this case.

III. The Tonnage Clause

As with the Commerce Clause, the Port Authority argues, but cannot show, that the Second Circuit applied the wrong legal standard under the Tonnage Clause. The Circuit Court discussed and clearly applied the standard set forth in *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935), and in circuit court cases that followed it (App. pp. 11a, 18a to 19a). The District Court also began its Tonnage Clause analysis with, and clearly applied, *Clyde Mallory* (App. p. 67a).

At the time the Second Circuit issued its decision, on May 29, 2009, *Clyde Mallory*, decided in 1935, was this Court's most recent analysis of the Tonnage Clause. About two weeks later, on June 15, 2009, the Court decided *Polar Tankers, Inc. v. City of Valdez*, __ U.S. __, 129 S. Ct. 2277 (2009). *Polar Tankers* confirms the

correctness of the Tonnage Clause holding below and forecloses any conceivable argument for reversal in this case.

The lower courts in this case recognized that the Tonnage Clause does not prohibit a state from levying a charge on a vessel "for services rendered to and enjoyed by the vessel, such as pilotage, or wharfage," or the "use of locks" (App. p. 67a to 68a [quoting *Clyde Mallory*, 296 U.S. at 265-66]; App. p. 11a [same]). This Court also recently so noted in *Polar Tankers*, 129 S. Ct. at 2283-84. The lower courts' conclusion that the passenger fee in this case goes far beyond such a permissible charge is entirely consistent with the Court's holding in *Polar Tankers*.

In *Polar Tankers*, the city of Valdez, Alaska, levied a tax on large ships that made substantial use of its port facilities. The city did not use the revenue from the tax exclusively, or even mainly, to provide services to the vessels. "To the contrary, the . . . tax [was] designed to raise revenue used for general municipal purposes." 129 S. Ct. at 2284. As the Court stated, because the imposition of the tax "is not for services provided to the vessel, it is unconstitutional." *Id. See also New Orleans Steamship Ass'n v. Plaquemines Port, Harbor & Terminal District*, 874 F.2d 1018, 1020 (5th Cir. 1989) (the Tonnage Clause "prohibits . . . duties to raise general revenues"); *Clyde Mallory*, 296 U.S. at 266 (the Tonnage Clause requires that the service be available to all fee payers).

The facts in this case are closely analogous to those in *Polar Tankers*. The Port Authority exacts a fee from

ferry passengers but spends a very substantial portion of the proceeds on projects and activities unrelated to, and that do not benefit, the passengers or the ferry service. The Port Authority's own officials readily conceded at trial, as the Second Circuit noted, that they use the passenger fee revenue to fund the Port Authority's broad purpose of fostering economic development in the entire city, and even beyond (App. p. 19a).[4] On these undisputed facts, the District Court's conclusion that the Port Authority imposes the passenger fee "for the impermissible purpose of raising general revenues" (App. p. 69a) is unassailable.

In challenging the lower courts' Tonnage Clause analysis, the Port Authority states that other courts have approved fees that supposedly were used to fund

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4. As summarized in the Second Circuit decision, the Port Authority's expert testified that the Authority "act[s] as an incubator for growth of economic activity that supports the city itself"; the Port Authority's auditor testified that non-ferry projects benefit the City and "the entire community"; a Port Authority commissioner testified that the purpose of the passenger fee has always been "to create a source of revenue to support the operations of the Port Authority"; and the Port Authority's executive director testified,

> I think anything that helps business and commerce in the State of Connecticut is going to indirectly benefit the ferry passengers. . . . We don't work for the Port Jefferson Ferry Company or the Port Jefferson ferry passengers. We're a Port Authority and this is what we do. We're developing the port as our mission, bringing other maritime interest and businesses to the Port of Bridgeport.

(App. p. 19a).

"general services" (Petition p. 13) (citing *Barber v. Hawaii*, 42 F.3d 1185, 1196 (9th Cir. 1994), and *Captain Andy's Sailing, Inc. v. Johns*, 195 F. Supp. 2d 1157, 1175 (D. Hawaii 2001) ["*Johns*"]). Yet the services involved in those cases were intended and available for use by the vessel owners who paid the fee. In *Barber*, the vessel owners conceded that they "receive use of restroom facilities, parking, trash disposal, and security from the state." 42 F.3d at 1196. And in *Johns*, the vessel challenging the fee had "unfettered access" to the improvements at the small-boat harbor that were funded by the fee, such as a breakwater, security, lights, and parking. 195 F. Supp. 2d at 1175. In this case, by contrast, both lower courts found that the bulk of the Port Authority's services "are not available to ferry passengers" (App. p. 19a; *see also id.*, p. 69a).

The Port Authority *incorrectly* states that the court in *Johns* approved a fee on vessels even though the amounts collected were "ten times higher" than the expenses made on the vessels' behalf (Petition p. 13). It was the vessel owner, not the court, who asserted that the fees collected were ten times higher than the cost of the benefits conferred. The court disregarded that calculation because it failed to take into account overhead costs that were allocable to the relevant harbor. 195 F. Supp. 2d at 1175 (Conclusions of Law 34-35). Significantly, in the same decision the court held that a fee imposed on another vessel, operating in Hawaii's Na Pali Coast waters, violated the Tonnage Clause, because that fee "does not relate to a specific service that confers a readily perceptible benefit to vessels operating" in those waters. *Id.* at 1173 (Conclusions of Law 19-20).

Finally, the Port Authority repeats the argument it makes with respect to the Commerce Clause, that the lower courts failed to give the Port Authority credit for ferry-related capital improvements that were funded by federal and state grants (Petition p. 14). The Port Authority wrongly accuses the lower courts of "ignoring" the benefits accruing to passengers from these capital projects (*id.*), and wrongly characterizes the grant funds as "costs incurred by the Port Authority" (*id.*).

As noted in Point II above (at pp. 12-13), neither the District Court nor the Second Circuit ignored the government grants. The District Court expressly rejected the Port Authority's argument that it may recoup, through a user fee, costs that it did not actually incur, but rather that it received as grants from other governmental units (App. 34a). The Port Authority's position, if accepted, would lead to absurd results. In the context of *Polar Tankers*, for example, if the federal government were to award the city of Valdez $100 million to improve the harbor facilities, under the Port Authority's analysis, the city would be entitled to "recoup" those costs *for itself* by taxing ships that use the harbor. The idea makes no sense, and the Port Authority cites no decision to support it. As noted above (p. 12), the Ninth Circuit has expressly rejected it. *Clallam County*, 849 F.2d at 430.

Accordingly, the Second Circuit correctly held that the passenger fee is excessive, and violates the Tonnage Clause, to the extent it is used to raise revenue for general municipal purposes. The judgment below is entirely consistent with this Court's very recent analysis in *Polar Tankers*, and raises no issue requiring the Court to again analyze that seldom litigated constitutional provision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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